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Associate Professor of Law, University of Utah College of Law; B.A., 1973, Occidental College; J.D., 1976, Columbia University School of Law. I gratefully acknowledge the invaluable comments I received on earlier drafts of this Article from Lee. E. Teitelbaum, Associate Academic Dean at the University of Utah College of Law, my other colleagues on the faculty, Professors John J. Flynn, Leslie P. Francis, Wayne McCormack and Donald N. Zillman, and Professor Thomas Ross of the University of Pittsburgh School of Law and Professor Gerald Torres of the University of Minnesota School of Law. I also wish to thank Dean Ned Spurgeon for summer research allocations from the University of Utah College of Law Excellence in Teaching and Research Fund and the University of Utah Research Committee for the award of a Faculty Starter Grant.

RECONSTRUCTING THE TAKINGS DOCTRINE BY REDEFINING PROPERTY AND SOVEREIGNTY

*John Martinez**

Dean Lipsker and Ms. Heldt, the authors of *Regulatory Takings: A Contract Approach*, state:

> This Article analyzes the takings problem by focusing on the nature of and purposes served by property ownership. Professor Martinez suggests that much of the current confusion in takings jurisprudence arises from the failure of the courts to develop a coherent federal constitutional property theory that adequately addresses the expectations of the private property owner. The Article proposes replacing the traditional two-step takings analysis of first determining what constitutes a protectable property interest and then determining when governmental regulation affects that interest to an extent requiring compensation, with a one-step analysis that focuses on the regulatory impact on the functions that property serves.
>
> Our Article focuses on the second step of the traditional two-step takings analysis without addressing the problem of defining protectable property interests. We believe, however, that our proposed expectations-based approach is fully consistent with this Article's proposal.

I. Introduction

The takings "problem"[1] is about many things. It has to do with the nature of ownership of property, the nature of government, and

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1. The threshold proposition in this Article is that there *is* a takings "problem" in the law. For a list of the classic analyses of the takings problem, see *infra* note 4.

the definition of private rights and public authority and the line between them.[2] The takings problem concerns governmental action affecting private property in such a manner that society must consider whether the governmental action should be invalidated, compensation should be paid, or whether some other remedy should be provided.[3] Determining when protectable property is involved, when government action has improperly affected such an interest and what kind of relief is available, however, has vexed the courts for a number of years.[4]

It may initially seem odd that the takings problem presents such difficulty, given that there is a constitutional provision that appears to address the problem directly. The fifth amendment's "just compensation clause" plainly states that the federal government shall not take private property for public use without just compensation.[5] This prohibition extends to state governments through the "due process clause" of the fourteenth amendment.[6] Moreover, there are situations that clearly fall within the just compensation clause. For example, suppose that an individual owns a vacant lot that happens to be located in the path of a proposed freeway. The government can then bring a condemnation proceeding at which a battle of

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2. The takings problem involves an interplay of property, government and the boundary between the two. Elaboration of that interplay, and how society can develop a workable doctrine, is the thrust of this Article.

3. The study of the takings problem is important so that people, whose property expectations are affected by governmental action, can legitimately complain in situations where the government has overstepped its bounds and some sort of remedy should be provided.

4. For classic analyses of the takings problem, see B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977) [hereinafter ACKERMAN]; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971).

5. The fifth amendment concludes with the following provision:

> [N]or shall private property be taken [by the government] for public use, without just compensation.

U.S. CONST. amend. V.

6. The fourteenth amendment's due process clause provides in pertinent part:

> [N]or shall any State deprive any person of . . . property, without due process of law . . . .

U.S. CONST. amend. XIV, § 1. The Supreme Court first held the fifth amendment's just compensation clause applicable to the states through the fourteenth amendment's due process clause in 1897. Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226, 241 (1897); *see also* First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2383 n.4 (1987) ("[t]he [f]ifth [a]mendment . . . applies to the [s]tates through the [f]ourteenth [a]mendment").

experts will determine the amount of compensation the individual will receive.[7]

This example illustrates the classic elements of a just compensation clause claim. First, it involves something society unquestionably identifies as private property—land. Second, the governmental action is a "taking"[8] for a "public use"[9] in that it puts the public in the place of the individual—the vacant lot, formerly the individual's, will now be used by the public. Finally, the action can be regarded as an intentional act by the government because the condemning agency knew that it was drastically altering the individual's relationship to the property[10] and thus obligated to compensate the individual for the act.[11]

Suppose, however, that an individual purchases a vacant lot that is zoned for apartment buildings. If the area is later rezoned to allow only single-family residences, the individual's lost expectation of someday constructing an apartment building on the land is not so clearly a loss of "property." In the direct condemnation situation, a physical tangible vacant lot is involved; here, only an intangible hope is affected—the individual has not lost use of that property, but only an expectation or hope about the way he will use it.[12]

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7. *See* Francis, *Eminent Domain Compensation in Western States: A Critique of the Fair Market Value Model*, 1984 UTAH L. REV. 429 [hereinafter Francis].

8. *See infra* notes 112-16 and accompanying text.

9. *See* Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355 (1983) [hereinafter Ross].

10. *See infra* notes 117-23 and accompanying text.

11. As long as certain minimal procedural requirements are fulfilled, the exercise of direct condemnation through the power of eminent domain rarely presents legal problems.

The power of eminent domain, sometimes known as the power of "direct condemnation," is referred to as "an attribute of sovereignty." *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 239-45 (1984); Berman v. Parker, 348 U.S. 26, 31-33 (1954); City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 64-67, 646 P.2d 835, 839, 183 Cal. Rptr. 673, 676 (1982) (eminent domain power is "attribute of sovereignty" which authorizes taking of intangible personal property such as professional football franchise).

For a critique of the relatively flimsy nature of the "public use" limitation, see Ross, *supra* note 9. The use of fair market value to measure "just compensation" in eminent domain proceedings is analyzed in Francis, *supra* note 7.

12. The hope of keeping the lot is also involved in the eminent domain setting, of course, but is deemed incorporated into the fair market value paid as just compensation. *See* Francis, *supra* note 7, at 439-41.

With "direct condemnation," the government proceeds under a constitutional principle which authorizes it to affect private property with a conscious expectation that, if it does so, it will be financially obligated to the owner. *See supra* note 11 and accompanying text. With less overt forms of action such as zoning, however, the government may not expect to pay for its incursion and may act otherwise if the obligation to compensate is known. *See infra* note 123 and accompanying text.

Moreover, even if that hope will be treated as "property" by law, it is not clear that a "taking" for "public use" has occurred. The public has surely not acquired the individual's land and it strains language to say that the public has acquired his hope. The individual's expectation of someday constructing an apartment building is gone, but he can still use the lot for single-family residences.[13] But is *extinction* of that expectation for a "public purpose" sufficient to trigger a remedy? If so, should the individual be entitled to have the rezoning ordinance declared invalid or be able to force the city to buy his lot or at least pay damages for having diminished the potential value of the lot?

To take a more drastic example, suppose instead that the lot is rezoned for "conservation area" use,[14] rendering the lot unsuitable for any reasonably profitable use. The individual's hope of deriving any profit from the lot would vanish. Is that expectation "property"?

Courts and scholars have long struggled with these important questions. After generally avoiding decisions on the merits in takings cases for nearly a decade,[15] the Supreme Court, in 1987, decided three cases involving "takings" challenges to governmental exercise of the power to control land use.[16] In this trilogy of takings cases,

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13. Perhaps it is more accurate to say that the extinction of the individual's expectation is for a public purpose—the public may be better off with fewer apartments in the area.

14. *See, e.g.*, Corrigan v. City of Scottsdale, 149 Ariz. 538, 539, 720 P.2d 513, 514 (1986) ("conservation area" restricted to use for open space, free of substantial physical construction or structures).

15. *See* MacDonald v. Yolo County, 477 U.S. 340, 351-53 (1986).

16. *See* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3150 (1987) (Court held that Commission's requirement that Nollan convey easement to state allowing public access along seaward side of their coastal property as condition of Commission's grant of permit to allow them to demolish existing dilapidated bungalow and construct new three-bedroom house constituted "taking" under just compensation clause); First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2388-89 (1987) (Court held that if county's zoning ordinance prohibited all land use, it was taking of property through regulatory action, permitting property owner to recover damages from county for period of ordinance's enforcement against property); Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1249 (1987) (Court held that Pennsylvania could prohibit coal mining under certain structures unless coal "pillars" were left to support overlying structures, despite effectively preventing coal owners from mining about 2% of their coal, which amounted to about 27 million tons). For a more detailed discussion of these cases, see Martinez, *A Critical Analysis of the 1987 Takings Trilogy: The* Keystone, Nollan *and* First English *Cases*, 1 HOFSTRA PROP. L.J. 39 (1988) [hereinafter Martinez].

the Court affirmed the continued validity of a three-part analytical model in addressing the takings problem: (1) is private property involved; (2) has governmental action so affected it as to require a remedy; and (3) what remedy should be provided?[17]

Part II of this Article critically examines that model. Part III argues that the first two questions are fundamentally indistinguishable and that to treat them as distinct inquiries is unworkable. Part IV therefore proposes a functional approach under which individuals are protected from governmental regulation only insofar as the reasons for having property are preserved. The Article concludes by identifying the questions that must be addressed before the takings doctrine can be reconstructed along functional lines.

II. The Framework of the Takings Problem

A. Protectable Property

The threshold determination of whether governmental action affects private property in violation of the Constitution is whether protectable "property" is involved.[18] This is true whether the challenge is made under the just compensation clause[19] or under the due

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17. For other references to the takings problem as a three-part inquiry, see ACKERMAN, *supra* note 4, at 6; Note, *Takings Law and the Contract Clause: A Takings Law Approach to Legislative Modifications of Public Contracts*, 36 STAN. L. REV. 1447, 1479-81 (1984).

18. Protectable "property" is the point of departure dictated by the text of the just compensation clause, which prohibits the taking of private property without just compensation, as well as by the text of the due process clause, which prohibits the deprivation of property without due process of law. *See supra* notes 5-6 and accompanying text.

19. In takings situations, the threshold question is whether protectable "property" is involved, regardless of whether the government purports to be exercising the power of eminent domain or some other power. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984) (in police power setting, involving regulation of pesticide manufacture); United States v. Willow River Power Co., 324 U.S. 499, 502-03 (1945) (in eminent domain setting, no property right in flow of river); United States v. General Motors Corp., 323 U.S. 373, 380 (1945) (in eminent domain setting, property right in certain leases); A-B Cattle Co. v. United States, 621 F.2d 1099, 1104 (Ct. Cl. 1980) (in police power setting, no property right to silty water); *see also* Summa Corp. v. California, 466 U.S. 198, 209 (1984) (state constitutional authority to assert "public trust" easement over private lands); Dames & Moore v. Regan, 453 U.S. 654, 688 (1981) (federal power over foreign affairs authorizing freezing of Iranian assets); Kaiser Aetna v. United States, 444 U.S. 164, 171-72 (1979) (federal commerce clause power to regulate access to navigable waters).

process clause.[20] Recent decisions by the Supreme Court shed light on the meaning of "property" for federal constitutional purposes.

In *Board of Regents v. Roth*,[21] a college assistant professor claimed that a university's failure to provide him with notice and a hearing before deciding not to renew his one-year contract was a denial of his procedural due process rights which infringed upon his property interests.[22] The Court ruled, however, that in order for a person to have a property interest, he must have a "legitimate claim of entitlement to it."[23] In short, an individual must have more than an abstract need, desire or unilateral expectation.[24] The Court found no term in the professor's contract, university policy or state statute that supplied the basis for any legitimate claim to contract renewal.[25]

The Court's holding in *Roth* indicates that state and federal law, other than federal constitutional law, may determine which expectations are to be accorded "property" status. At the same time, not all expectations denominated "property" under various state or federal laws will necessarily be treated as property for federal constitutional purposes.[26] Similarly, not all interests denied property status by state or federal law will necessarily be denied federal constitutional protection as "property."[27]

In *Ruckelshaus v. Monsanto Co.*,[28] the Supreme Court, however, held that a separate federal constitutional inquiry into the definition of property is necessary, thus apparently abandoning the *Roth* principle of deference to state and federal law. In *Ruckelshaus*, the Monsanto chemical company was required to submit research and test data to the Environmental Protection Agency (EPA) as part of the process for obtaining licenses for the manufacture and sale of pesticides.[29] Monsanto alleged that the information was "property" under Missouri state law, and that its release by the EPA to Monsanto's competitors in the course of the EPA's review of other

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20. *See, e.g.*, Daniels v. Williams, 474 U.S. 327 (1986) (deliberate non-negligent government conduct must be shown to establish due process deprivation); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Eames v. City of Logan, 762 F.2d 83 (10th Cir. 1985).

21. 408 U.S. 564 (1972).

22. *See id.* at 566-69.

23. *Id.* at 577.

24. *See id.*

25. *See id.* at 578.

26. *See infra* notes 28-33 and accompanying text.

27. *See infra* notes 34-40 and accompanying text.

28. 467 U.S. 986 (1984).

29. *See id.* at 998.

chemical registration applications was a "taking" in violation of the fifth amendment.[30]

Although the EPA did not seriously dispute this contention, the Court neither accepted Monsanto's claim nor undertook an independent inquiry into Missouri law.[31] *Roth*'s deference to state law definitions of property was noted, but the Court seemingly abandoned that approach in favor of an inquiry into the "general perception" of trade secrets as property, drawn from such sources as prior Supreme Court decisions, property and philosophical treatises, and the congressional legislative history of pesticide regulation.[32] Only after concluding that the information involved was property under the constitutional inquiry did the Court return to state law, holding that "to the extent that Monsanto [had] an interest in its . . . data cognizable as a trade-secret property right under Missouri law, that property right [was] protected by the [t]akings [c]lause of the [f]ifth [a]mendment."[33]

Similarly, the Court will not automatically refuse to extend constitutional protection to expectations *not* regarded as "property" under pertinent federal or state law.[34] In *Ruckelshaus*, for example, the EPA argued that by requiring the research and test data to be submitted, Congress had "pre-empted" state law from defining such information as property.[35] In rejecting this argument, the Court referred to *Webb's Fabulous Pharmacies, Inc. v. Beckwith*.[36] In *Webb's*, a Florida statute purportedly allowed a county court to retain the interest on interpleader funds deposited with the court pending final distribution among the contending parties.[37] The state court had construed the statute as declaring that the interest was not "property."[38] Referring to property law in other states and in federal courts, the Supreme Court found that such an interest was generally considered to be a "property" interest of the ultimate distributees which the state could not simply define out of existence.[39]

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30. *See id.* at 998-99.
31. *See id.* at 1001.
32. *See id.* at 1002-03.
33. *Id.* at 1003-04.
34. *See infra* notes 35-40 and accompanying text.
35. 467 U.S. at 1012.
36. *See id.*; Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980).
37. 449 U.S. at 155-56.
38. Beckwith v. Webb's Fabulous Pharmacies, Inc., 374 So. 2d 951, 958 (Fla. 1979), *rev'd*, 449 U.S. 155 (1980).
39. *Webb's*, 449 U.S. at 164.

In *Ruckelshaus*, the Court held that Congress could not by similar *ipse dixit* deny Monsanto's property interest.[40]

Ultimately, the nature of protectable property for "takings" purposes, however, is a constitutional issue, even if deference is given to state or federal laws. The next question under the takings problem doctrine is whether governmental action has so affected property as to require a remedy.

B. Government Action Affecting Property—Two Countervailing Theories

Courts employ two legal theories to ascertain whether government action has so affected property as to warrant a remedy: the "due process approach" and the "just compensation approach."[41] These theories can be analyzed according to four factors: (1) the characterization of the property involved; (2) the closely connected question of the government's effect on property; (3) the remedies involved; and (4) the extent of judicial deference to legislative determinations.[42]

1. Due Process Approach

The due process theory is exemplified by the Supreme Court's decision in *Village of Euclid v. Ambler Realty Co.*[43] In *Euclid*, Ambler Realty owned sixty-eight acres of land which it hoped to develop for industrial purposes, a use for which it alleged the property had a value of $10,000 per acre.[44] A Village of Euclid zoning ordinance, however, restricted the property to residential use, for which Ambler alleged the property had a value of $2,500 per acre.[45] Ambler sought to enjoin enforcement of the ordinance on the ground that it violated due process on its face.[46]

After summarizing various reasons which might sustain the segregation of industrial from residential uses as a proper exercise of the police power to protect the public, the Court concluded:

> If these reasons . . . do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated

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40. 467 U.S. at 1012.

41. *See infra* notes 43-127 and accompanying text.

42. These factors resemble those used to examine the takings problem as a whole. *See supra* note 17 and accompanying text.

43. 272 U.S. 365 (1926).

44. *See id.* at 384.

45. *See id.*

46. *See id.* at 367.

> . . . at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.[47]

The Court was particularly concerned that Ambler sought to enjoin enforcement of the ordinance as unconstitutional on its face, and thus render it invalid in all circumstances, not just with respect to Ambler's property.[48] In *Nectow v. City of Cambridge*,[49] the Court had the opportunity to deal with the application of the zoning power to particular property.

In *Nectow*, the plaintiff owned a 140,000 square foot parcel located at the boundary between an area of the city zoned for residential uses and an unzoned area developed mostly for industrial uses.[50] The city had somehow managed to draw the line dividing the residential zoned sections and the unzoned sections in such a way as to lop off a 100-foot wide portion of the parcel as residential, leaving the remainder unzoned.[51] Nectow applied for a permit "to erect any lawful buildings [on the tract] without regard to the provisions of the ordinance including such tract within a residential district."[52] When that permit was refused, Nectow sought a mandatory injunction in state court requiring the issuance of the permit on the ground that it deprived him of his property without due process.[53]

The Supreme Court deferred to a master's finding, noting that "the health, safety, convenience and general welfare of the inhabitants of the part of the city affected [would] not be promoted by the disposition made by the ordinance of the [property] in ques-

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47. *Id.* at 395 (citations omitted).

48. *See id.* The Court made the following observation:

> [W]here the equitable remedy of injunction is sought . . . not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground [of] the mere existence and threatened enforcement of the ordinance . . . the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration . . . which, if attacked separately, might not withstand the test of constitutionality.

Id.

49. 277 U.S. 183 (1928).

50. *See id.* at 186.

51. *See id.* at 187.

52. *Id.* at 186.

53. *See id.* at 185.

tion."[54] Paraphrasing *Euclid*, the Court set forth the standard for judicial review:

> [A] court should not set aside the determination of public officers in such a matter unless it is clear that their action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."[55]

Accordingly, the Court sustained the state court's mandatory injunction directing issuance of the permit sought by the plaintiff.[56]

In *Hadacheck v. Sebastian*,[57] the Court upheld a municipal ordinance under a due process analysis.[58] At issue in *Hadacheck* was a Los Angeles ordinance that made it a misdemeanor to establish or maintain a brickyard or place for the manufacture or burning of brick.[59] Hadacheck, prosecuted for operating a brickyard despite the ordinance,[60] brought a petition for *habeas corpus* alleging that the ordinance was invalid because it reduced the value of his property and therefore deprived him of property without due process of law.[61]

The Court first observed that Hadacheck could not only use his property for purposes other than as a brickyard, but that he could even continue to extract the clay deposits for making bricks elsewhere, as long as he did not actually manufacture bricks on the premises.[62] Noting the California Supreme Court's finding that the brickyard was injurious to public health and welfare because it produced fumes, gases, smoke, soot, steam and dust,[63] the Court upheld the ordinance as a valid exercise of the city's police power.[64]

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54. *Id.* at 188.

55. *Id.* at 187-88 (quoting *Euclid*, 272 U.S. at 395).

56. *See id.* at 187-89.

57. 239 U.S. 394 (1915).

58. *See id.* at 410-11.

59. *See Ex parte* Hadacheck, 165 Cal. 416, 417, 132 P. 584, 585 (1913), *aff'd sub nom.* Hadacheck v. Sebastian, 239 U.S. 394 (1915).

60. *Hadacheck*, 239 U.S. at 404-05.

61. *See id.* at 405-07. Hadacheck claimed that the ordinance reduced the value of his property from $800,000 for use as a brickyard to $60,000 for residential purposes. *Id.* at 405.

62. *See id.* at 411.

63. *See id.* at 408, 411.

64. *See id.* at 410.

> It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because

Although the plaintiffs in *Euclid*, *Nectow* and *Hadacheck* each sought to use land for industrial purposes,[65] in each case the Court did not consider the *intended or existing industrial use* as the "property" involved, but instead considered the "property" *the land itself*.[66] This is significant because the governmental effect in each case was held to be the prevention of an intended or existing use, not the deprivation of the underlying realty. In *Euclid*, restricting Ambler to residential uses was justified because, in the context of a generalized attack leveled at the entire ordinance, the Court concluded that the public health, safety, welfare and morals were advanced.[67] In *Nectow*, in contrast, restricting the landowner to residential uses was not justified because no "public purpose" was served in the particular application.[68] In *Hadacheck*, the prevention of the continued operation of the brickyard was justified because of the adverse, nuisance-like effects it imposed on the surrounding community.[69]

The remedial aspect of the "due process" cases is also worth noting. *Euclid*, *Nectow* and *Hadacheck* all involved attempts to invalidate ordinances, not claims for damages. Ambler Realty sought an injunction against the Euclid zoning ordinance,[70] Nectow sought issuance of a development permit[71] and Hadacheck sought a writ of *habeas corpus*.[72] Invalidation prohibits the implementation of local zoning in the particular circumstances, and thereby frustrates preservation of the general health, safety, welfare and morals that such zoning represents. In contrast, awarding monetary relief would allow implementation, but at a price.

Finally, in each of these cases the Supreme Court was highly deferential towards governmental control of land use.[73] Whether a

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> of conditions once obtaining. . . . To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community.

Id. (citations omitted).

65. *See Nectow*, 277 U.S. at 187; *Euclid*, 272 U.S. at 384; *Hadacheck*, 239 U.S. at 405.

66. *See Nectow*, 277 U.S. at 188-89; *Euclid*, 272 U.S. at 388-89; *Hadacheck*, 239 U.S. at 411-12.

67. 272 U.S. at 391.

68. 277 U.S. at 188-89.

69. 239 U.S. at 410-11.

70. *See Euclid*, 272 U.S. at 384.

71. *See Nectow*, 277 U.S. at 186.

72. *See Hadacheck*, 239 U.S. at 404-05.

73. *See Nectow*, 277 U.S. at 188; *Euclid*, 272 U.S. at 390-95; *Hadacheck*, 239 U.S. at 410-11.

public purpose was served was left largely to the discretion of the governmental entities charged with the authority to draw lines. So long as a "public purpose" was served, substantial detrimental effects on property interests were upheld.

2. Just Compensation Approach

The just compensation theory, like the due process approach, involves defining property, determining the significance of state action affecting property, resolving the significance of the remedy sought, and deciding the extent of deference to be paid to governmental decisions. These elements, however, are applied differently. Under the just compensation analysis, property is viewed more expansively and a lesser incursion will be deemed sufficient to trigger relief.[74] In addition, much less deference is paid to governmental determinations[75] and the remedy sought is compensation, not just invalidation.[76]

The just compensation approach originated in the Supreme Court's holding in *Pennsylvania Coal Co. v. Mahon*.[77] Pennsylvania common law recognized three separate property interests with respect to coal lands: (1) the right to use the surface of the land; (2) the right to mine coal under the surface; and (3) the right to support of the surface.[78] In *Pennsylvania Coal*, the Pennsylvania Coal Company sold the surface rights of the land in question to the Mahons' predecessor in title.[79] In the deed, however, the company retained the right to the coal under the land, *as well as the right to the support of the surface*.[80] Moreover, the predecessor in title also waived all claims against the company for harm caused by subsidence resulting from mining operations.[81] Subsequently, Pennsylvania passed the Kohler Act,[82] which prohibited the mining of coal beneath someone else's property in such a manner as to cause subsidence of

74. *See infra* notes 94-119 and accompanying text.
75. *See infra* notes 120-23 and accompanying text.
76. *See infra* notes 124-27 and accompanying text.
77. 260 U.S. 393 (1922).
78. *See id.* at 395. Accordingly, the right to use the surface could be alienated separately from the right to the *support* of the surface. *See* Penman v. Jones, 256 Pa. 416, 100 A. 1043 (1917); *see also* Captline v. County of Allegheny, 74 Pa. Commw. 85, 459 A.2d 1298 (1983) (separation of property interests still part of Pennsylvania property law), *cert. denied*, 466 U.S. 904 (1984).
79. 260 U.S. at 412.
80. *See id.*
81. *See id.*
82. 1921 Pa. Laws 1198.

various surface uses, including residential uses.[83] When the company gave the Mahons notice that it was about to engage in mining beneath their residence and that it did not intend to leave columns of coal in place to support the surface, the Mahons, citing the Kohler Act, obtained an injunction in state court.[84]

In an opinion written by Justice Holmes, the Supreme Court held that, as applied to the circumstances, the Kohler Act was invalid, thus overturning the injunction.[85] The Court determined that the public interest involved was limited because only the Mahons' and other similarly situated houses in a relatively restricted part of Pennsylvania were involved.[86] In addition, the Court found that the interest of the state in personal safety could be achieved by a notice requirement, rather than by a prohibition from mining in such circumstances.[87] On the other hand, the Court found a severe impact on the coal company—its retained right to surface support recognized by Pennsylvania common law, as well as its contract right obtained through the waiver of claims resulting from subsidence, were both abolished.[88] Thus, the limited public interest coupled with the adverse effect on the coal company persuaded the Court that the Kohler Act effected a "taking" of the coal company's property for which the power of eminent domain, not the police power, had to be exercised and compensation provided.[89]

Two aspects of *Pennsylvania Coal*, however, make it a troublesome foundation for a new direction in the law. First, takings cases usually cast the property owner as a plaintiff who sues for harm to his or her property.[90] Thus, *Pennsylvania Coal* is peculiar in that the coal company, whose property interests were the subject of the dispute, was cast as the defendant whom the Mahons wished to enjoin from mining under their home.[91] Second, in the typical takings case the

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83. *See id.*

84. *Pennsylvania Coal*, 260 U.S. at 394-95. According to standard practice, if the owner of the coal did not also own the surface rights, or at least the right to surface support, the owner of the coal rights would leave enough coal to assure surface support, or artificial supports would be installed. *See id.* at 420 (Brandeis, J., dissenting).

85. *See id.* at 414.

86. *See id.* at 413-14.

87. *See id.*

88. *See id.* at 414.

89. *See id.* at 413-15.

90. *See* MacDonald v. Yolo County, 477 U.S. 340, 342 (1986).

91. 260 U.S. at 412-14.

property owner seeks compensation.[92] In *Pennsylvania Coal*, the coal company had not sought compensation; in fact, it had sought no affirmative relief at all.[93] The only question before the Court was whether the injunction in favor of the Mahons issued by the state courts would be upheld. Accordingly, the discussion about compensation in *Pennsylvania Coal* is pure dictum.

(a) Definition of the Relevant Property

In addition, it is instructive to consider Justice Holmes' conclusion in *Pennsylvania Coal* that the coal company's rights were completely destroyed.[94] If that is true, then the situation might be thought to incorporate one of the classic characteristics of direct condemnations—the complete extinction of a private interest.[95] But whether the company's rights were actually completely destroyed depends on what one considers as the "relevant" property. A broad definition of the relevant property would treat "the right to mine coal" under the Mahon residence as the proper starting point for analysis. Using that definition, it is clear that the company was not *completely* deprived of its "property," because it could have mined the coal as long as it left supporting columns of coal or wooden timbers in place to support the surface.[96]

The company argued, however, that leaving wooden timbers instead of supporting columns of coal to support the surface would not be economically feasible.[97] The issue was thus narrowed to whether the company had to leave such columns of coal. Justice Holmes accepted that narrow definition of the relevant property; he concluded that "[the Kohler Act] purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate . . . ."[98] The "estate" protected was the right to mine coal without regard to surface subsidence.[99] That estate was represented by the columns of

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92. *See infra* note 123 and accompanying text.

93. 260 U.S. at 412.

94. *See id.* at 414.

95. *See supra* notes 8-11 and accompanying text.

96. This lack of complete deprivation constituted one of the bases upon which the Supreme Court ultimately ruled in favor of the state in Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1249-50 (1987). For a more detailed analysis, see Martinez, *supra* note 16, at 49-52.

97. *See Pennsylvania Coal*, 260 U.S. at 395.

98. *Id.* at 414.

99. This combined the second and third estates recognized under Pennsylvania common law. *See supra* note 78 and accompanying text. Thus, the second estate—the right to the coal—was construed to confer on the coal company the right to

coal that would otherwise have to be left in place to support the surface.[100]

In contrast to the narrow definition of the relevant property adopted by Justice Holmes in *Pennsylvania Coal*, the Supreme Court has taken a broad perspective in defining the relevant property in due process theory cases, holding that the "property" in each instance is the land itself, not the intended or existing industrial use of it.[101] As the decision in *Pennsylvania Coal* demonstrates, the initial definition of the relevant property almost inevitably determines whether the property interest is deemed completely destroyed or merely reduced in value by the governmental action involved. A narrow definition is more likely to lead to the conclusion that property is destroyed; a broad definition is more likely to lead to the conclusion that property is merely diminished in value.[102] It is therefore critical to provide a standard for determining whether the relevant property should be narrowly or broadly defined in any given situation. The Court in *Pennsylvania Coal*, however, did not address that question and subsequent Supreme Court decisions have not been consistent.[103]

In *Penn Central Transp. Co. v. New York City*,[104] the Court explored whether the relevant property for purposes of takings analysis should be narrowly or broadly defined.[105] In *Penn Central*, New

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mine, while the third estate—the right to surface support—was construed to confer on the coal company the right to conduct its activities without regard to surface subsidence. *See Pennsylvania Coal*, 260 U.S. at 414 (describing estates involved as both *property* interest in mining coal as well as *contract* right to be free of obligation to provide surface support: "[the Kohler Act] purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—*and* what is declared by the [c]ourt below to be a contract hitherto binding [upon] the plaintiffs") (emphasis added); *see also id.* at 419 (Brandeis, J., dissenting) (majority claims that "the restriction destroys existing rights of property *and* contract") (emphasis added); *but cf.* Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 566-67 (1984) (interpreting right protected by majority in *Pennsylvania Coal* as consisting solely of third estate—the right to surface support) [hereinafter Rose].

100. The columns of coal thus had a dual character. Intrinsically, they were valuable coal deposits; symbolically, they represented the obligation to support the surface.

101. *See supra* note 66 and accompanying text.

102. It take less intrusive governmental action to affect substantially property defined narrowly than property defined broadly. *See* Rose, *supra* note 99, at 566-68 (scope of relevant property has dramatic impact on "takings" determination).

103. *See id.* at 568 (highlighting indeterminate character of the Court's discussion in providing standard for determining whether relevant property should be narrowly or broadly defined).

104. 438 U.S. 104 (1978).

105. *See id.*

York City prohibited the Penn Central Transportation Company from demolishing the historic Grand Central Terminal and constructing a fifty-five-story office building in its place.[106] Penn Central claimed this completely destroyed its right to build in the air space above the terminal.[107] In rejecting this argument, the Court stated:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . .[108]

Arguably, *Penn Central* thus authorizes a broad definition of the relevant property. In contrast, however, the Court adopted a narrow definition in *Loretto v. Teleprompter Manhattan CATV Corp.*[109] In *Loretto*, the Court held that a New York statute authorizing a cable television company to install cables and switch boxes on a privately owned apartment building was a "taking" because it constituted a permanent, physical occupation by governmental authority.[110] A broad definition would have considered the land, together with the apartment building and the uses to which they might be put, as the relevant property. Under that definition, Loretto was not *completely* deprived of property, but only of the use of a small part of the building. Yet, the Court adopted a narrow definition by treating the one and one-half cubic feet of the apartment building occupied by the cables and switch boxes as the relevant property.[111]

(b) Governmental Effect on Property

The second factor in analyzing the just compensation theory, as established by *Pennsylvania Coal*, is determining the government's effect on property. In *Pennsylvania Coal*, the Court held that the

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106. *See id.* at 116-17.
107. *See id.* at 122.
108. *Id.* at 130-31.
109. 458 U.S. 419 (1982).
110. *See id.* at 425-26. The *Loretto* decision, however, has been severely criticized. *See, e.g.*, Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983). The most devastating criticism appears in Justice Blackmun's *Loretto* dissent. *See* 458 U.S. at 442 (Blackmun, J., dissenting); *see also* Andrus v. Allard, 444 U.S. 51 (1979) (no taking when federal statute prevented sale of eagle feathers because beneficial uses other than sale remained).
111. *Loretto*, 458 U.S. at 438 n.16.

coal company was completely prevented by the Kohler Act from exercising its right to surface support because it was required to leave either coal or timber columns in place.[112] Short of that situation, however, the Court has had difficulty articulating a standard for determining when governmental action so approaches the direct condemnation situation as to trigger fifth amendment protection. Only the permanent physical occupation involved in *Loretto* appears to be the clear case.[113] In other situations, the Court has folded consideration of the effect on property into a multi-factor analysis.[114] The Court has articulated three factors as particularly significant in determining whether a "taking" has occurred: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with identifiable investment-backed expec-

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112. 260 U.S. at 414-15.

113. 458 U.S. at 425-26.

114. The Supreme Court has stated that if governmental action does not substantially advance a legitimate governmental objective, a "taking" occurs. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985). This statement, made with respect to takings jurisprudence, is troublesome because it seems to fall in the interstices between the due process and just compensation theories and addresses when governmental action affecting property will require a remedy. *See* Laitos & Westfall, *Government Interference With Private Interests in Public Resources*, 11 HARV. ENVTL. L. REV. 1, 66 (1987) (referring to this as alternative takings test).

In *Pennsylvania Coal*, Justice Holmes premised transforming governmental action affecting property into an involuntary exercise of eminent domain on the finding that the coal company's property was entirely destroyed. *See supra* notes 94-100 and accompanying text. In contrast, the Supreme Court's statement in *Riverside* begins with the other side of the "effect on the property owner-public purpose" equation: it first examines the governmental justification for the effect on the property owner. 474 U.S. at 126-29.

Under the due process approach, the Court has deferred to legislative determinations regarding whether a legitimate governmental objective is served. *See supra* note 73 and accompanying text. If this were not so, then conceivably, even when public purposes were only "reasonably" rather than "substantially" served by governmental actions that minimally affected property, compensation might be required. Such an approach would come dangerously close to making it a tort for government to govern. *See* Dalehite v. United States, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting). Thus, the Court's statement probably cannot be taken literally. To do so would mean that closer judicial scrutiny would be triggered anytime property was affected at all. It therefore makes more sense to construe the statement to mean that if the threshold finding is made that property has been so drastically affected that it has been effectively destroyed and no public purpose is substantially advanced by such action, then a remedy, to wit, compensation, must be provided. This interpretation appears to be supported by the Court's recent decision in First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 3141 (1987); *see* Martinez, *supra* note 16, at 65-66.

tations; and (3) the character of the governmental action.[115] The Court, however, has not clearly defined those factors nor explained their interrelationship, tending instead to engage in ad hoc determinations.[116]

(c) The Remedy Sought

The third factor in analyzing the just compensation theory as established by *Pennsylvania Coal* involves remedies. Justice Holmes fashioned a link between one governmental power and another: If the police power is improperly exercised, in some circumstances, it may be transformed into the involuntary exercise of the power of eminent domain.[117] Ordinary exercises of the power of eminent domain usually involve a deliberate, conscious decision on the part of the government to affect property in such a manner that the fifth amendment's compensation requirement is triggered.[118] In contrast, under the just compensation theory, mere negligent governmental action may suffice to obligate the government to pay compensation.[119]

(d) The Extent of Judicial Deference

The final factor in analyzing the just compensation theory concerns the relatively minimal deference extended to legislative determinations regarding public purposes. Contrary to the deferential due process approach established by the Court in *Hadacheck*, *Euclid* and *Nectow*,[120] Justice Holmes, in *Pennsylvania Coal*, seemed relatively unconcerned about second-guessing the legislative judgment regarding the significance of the public interest involved in prohibiting the coal company from mining in a manner which would cause subsidence.[121] Justice

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115. *See, e.g.*, Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986).

116. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) ("essentially ad hoc, factual inquiries").

117. *Pennsylvania Coal*, 260 U.S. at 415 ("[t]he general rule . . . is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking").

118. *See supra* notes 10-11 and accompanying text.

119. The Court has recently held, however, that mere negligent *due process* violations will not give rise to government damages liability under 42 U.S.C. § 1983 (1981). *See* Daniels v. Williams, 474 U.S. 327 (1986). Governmental action must be "deliberate" in order for such liability to arise. *Id.* at 333-34.

120. *See supra* note 73 and accompanying text.

121. 260 U.S. at 413-14.

Holmes boldly ascertained whether a public interest would be furthered by the prohibition and found none.[122]

Once it is determined that a "taking" of "property" has occurred, the focus of the takings problem analysis then shifts to the question of the appropriate remedy. Prior to the Court's "takings" decisions in 1987, there was substantial debate whether damages should be provided.[123]

C. Remedies

In *First English Evangelical Lutheran Church v. County of Los Angeles*,[124] the Supreme Court held that if a county's zoning ordinance prohibited all use of land and was therefore a taking of property through regulatory action, then the property owner could recover damages for the period during which the ordinance was in force against the property.[125] One might have inferred from *First English* that every "taking" of "property" required compensation. In *Nollan v. California Coastal Comm'n*,[126] decided shortly after *First English*, however, the Court introduced a "per se takings justification rule," which provides that where takings are found pursuant to the "per se takings" line of cases such as *Loretto*, there are circumstances under which compensation is not required.[127] Unfortunately, the Court did not define those circumstances with any degree of precision.

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122. *See id.* A ramification of Justice Holmes' approach is that such close scrutiny of legislative purposes was conducted in the context of property concerns. While the Court has closely examined the exercise of governmental power when liberty interests are involved, it has hesitated to do so when property concerns are at issue. *See generally* Tushnet, *The Newer Property: A Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261; Comment, *Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis*, 57 WASH. L. REV. 715 (1982).

123. *See, e.g.*, Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 RUTGERS L.J. 15 (1983); Sterk, *Government Liability for Unconstitutional Land Use Regulation*, 60 IND. L.J. 113 (1984); Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984); Note, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulation*, 29 UCLA L. Rev. 711 (1982).

124. 107 S. Ct. 2378 (1987).

125. *See id.*

126. 107 S. Ct. 3141 (1987).

127. *See id.* at 3145-48. For further discussion, see Martinez, *supra* note 16, at 54.

III. Deconstructing the Takings Problem

A. The Property-Governmental Action Dichotomy Renders Existing Takings Analysis Unworkable

Before *First English*, the just compensation doctrine was a loose cannon potentially aimed at any regulatory governmental action affecting property; after *First English*, that cannon is loaded with the potent shot of the compensation remedy. The just compensation theory, however, remains a loose cannon because it is difficult to predict with any degree of certainty when a taking will be found.

There are, of course, some clear cases. The most obvious is the direct condemnation situation, where governmental action is a deliberate, conscious decision to sever the exclusive relationship between a property owner and his property, followed by judicial proceedings to determine "fair market value" and effect the transfer of title.[128]

There is also the "de facto" taking area, in which governmental initiation of direct condemnation proceedings, coupled with restrictions amounting to the prohibition of all reasonable "private" use and the use of the property by the public, will give rise to the remedy of judicially compelled direct condemnation.[129] For example, in *Peacock v. County of Sacramento*,[130] the plaintiff owned property adjacent to a privately owned airfield.[131] In 1960, the county leased the airfield as a public facility.[132] The county also zoned twenty-six and one-half acres of the plaintiff's property in the proposed approach pattern to the airport.[133] In 1965, the county tentatively decided to cancel the airport project because it appeared that the acquisition of the existing facility would be too costly.[134] From that year until 1969, when the case was decided on appeal, the County Board of Supervisors remained deadlocked—neither completely abandoning the airport project nor going forward with it.[135] The appellate court concluded that the county was required to purchase the entire fee outright, since during this interim period the plaintiff had been deprived of all reasonable beneficial use of his property.[136]

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128. *See generally* Francis, *supra* note 7, at 439-41.
129. *See* D. MANDELKER & R. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT, CASES AND MATERIALS 97-99 (2d ed. 1985).
130. 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969).
131. *See id.* at 846-47, 77 Cal. Rptr. at 393.
132. *See id.* at 848, 77 Cal. Rptr. at 394.
133. *See id.* at 846-47, 77 Cal. Rptr. at 393.
134. *See id.* at 850, 77 Cal. Rptr. at 395.
135. *See id.* at 850, 864-65, 77 Cal. Rptr. at 395, 404-05.
136. *See id.* at 864-65, 77 Cal. Rptr. at 404-05.

These cases represent clear examples where one can ask in an orderly manner what a person owns and what has been done to it. That paradigm breaks down, however, where less typical interests and forms of governmental action are involved. The *Ruckelshaus*[137] decision seemingly presents a third "clear" case, but one which ultimately invites consideration of the relationship between two issues held separate to this point: whether governmental action has so affected property as to require a remedy and whether "property" is involved at all.

In *Ruckelshaus*, Monsanto claimed that information provided to the EPA was "property" which had been "taken" by the EPA when released to Monsanto's competitors.[138] As discussed earlier, the Court concluded that the information was "property."[139] In determining whether property had been "taken," the Court recited the multi-factor litany[140] and held that consideration of the property owner's "reasonable investment-backed expectations" was dispositive.[141]

The Court noted that the data had been submitted to the EPA during three periods.[142] The Court concluded that Monsanto did not have a reasonable investment-backed expectation that information submitted before October 22, 1972 would be used exclusively for the purpose of considering Monsanto's application.[143] The Court based its conclusion on the fact that the EPA's "practice of using data submitted by one company during consideration of the application of a subsequent applicant was widespread and well known."[144] The Court concluded that data submitted to the EPA between October 22, 1972 and September 30, 1978, however, should have been maintained in the strictest confidence.[145] The Court observed that on October 22, 1972, the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) was amended allowing applicants to protect their testing and research information from disclosure by designating it as a trade secret at the time of submission.[146] Since Monsanto had complied with the terms of the Act, the governmental guarantee "formed the basis of a reasonable investment-backed expectation."[147]

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137. 467 U.S. 986 (1984).
138. *See id.* at 998-99.
139. *Id.* at 1000-04; *see supra* note 33 and accompanying text.
140. 467 U.S. at 1005.
141. *Id.*
142. *See id.* at 991-97.
143. *See id.* at 1008-10, 1013.
144. *Id.* at 1009.
145. *See id.* at 1010-13.
146. *See id.* at 991-93.
147. *Id.* at 1011.

Effective September 30, 1978, however, FIFRA was amended once more to provide that information submitted with pesticide registrations could be disclosed to the applicant's competitors once a ten-year period after submission had expired.[148] Accordingly, the Court held that Monsanto had no basis for expecting the information submitted during this third period of time would be kept confidential.[149]

Ruckelshaus illustrates the haziness, and perhaps the artificiality, of the boundary between defining property and determining when it has been so affected by governmental action that a remedy is required. In *Ruckelshaus*, the Court apparently concluded that the information involved was "property" before it embarked on the discussion about Monsanto's "reasonable investment-backed expectation" regarding it. Yet, the ensuing discussion seemed to define property all over again. The Court relied upon the discussion in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*,[150] which in turn derived from the *Roth* inquiry into the definition of property, to the effect that a " 'reasonable investment-backed expectation' " must be more than a " 'unilateral expectation or an abstract need.' "[151] As the discussion in the "protectable property" section of this Article demonstrates, that is the standard used to determine whether *property exists at all*, not whether it has been so affected as to require a remedy.[152]

The problem in *Ruckelshaus*, and the takings area in general, lies in the separation of property ownership from governmental limitation regarding the incidents of ownership. In the usual case, perhaps, one can act as if the separation were real. The law has long recognized—as if it were natural—the infrequency of direct governmental restrictions on property. The less typical cases, such as *Ruckelshaus*, however, suggest that property ownership is not a naturally occurring event to which government is a stranger, but rather a socially created proposition in which government participates.

B. The Nonconforming Use, Vested Rights and Estoppel Theories at Common Law Bridge the Analytic Gap Between Property and Governmental Action Affecting It

The notion that governmental action affecting property creates it is not new. It is hardly a revelation to positive-law theorists,[153] who

148. *See id.* at 993-97.
149. *See id.* at 1006-08, 1013.
150. 449 U.S. 155 (1980).
151. *Ruckelshaus*, 467 U.S. at 1005-06 (quoting *Webb's*, 449 U.S. at 161).
152. *See supra* notes 18-40 and accompanying text.
153. Austin is generally considered the founder of legal positivism. *See* J. AUSTIN,

assert that property interests exist primarily as they are given legal recognition by the state.[154] It may be a concept with which natural-rights theorists,[155] however, may disagree, because they maintain that property rights exist independently of the state.[156] Yet, in the land use area itself, there are a number of well-established doctrines dealing with when expectations will be protected in spite of changes in applicable rules.[157] In doing so, these doctrines define protectable "property" in different circumstances. A series of examples is illustrative.

1. The Nonconforming Use Theory

Assume, for example, that an individual owns an apartment building on a lot located in an area zoned for apartments. Assume further that the local zoning is changed to allow only single family residences. Is the person's expectation of continuing the apartment use protected

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1 LECTURES ON JURISPRUDENCE (R. Campbell 5th ed. 1885); *see also* R. DWORKIN, TAKING RIGHTS SERIOUSLY 16 (1977) [hereinafter DWORKIN]; G. CHRISTIE, JURISPRUDENCE 467 (1973). H. L. A. Hart is generally regarded as the most powerful exponent of Austin's theory. H. L. A. HART, THE CONCEPT OF LAW (1961); *see* DWORKIN, *supra*, at 16. *See generally* Spann, *Secret Rights*, 71 MINN. L. REV. 669 (1987); *Symposium on Richard Epstein's Takings; Private Property and the Power of Eminent Domain*, 41 U. MIAMI L. REV. 253 (1986).

154. *See generally* Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039.

155. John Locke is generally considered the leading exponent of natural rights theory. *See, e.g.*, J. LOCKE, TWO TREATISES OF GOVERNMENT (P. Laslett rev. ed. 1963). The most widely recognized modern proponent of natural rights theory is Ronald Dworkin. *See* R. DWORKIN, LAW'S EMPIRE (1986); R. DWORKIN, A MATTER OF PRINCIPLE (1985); DWORKIN, *supra* note 153. For a recent analysis of Dworkin's thesis, see Soper, Book Review, 100 HARV. L. REV. 1166 (1987).

156. *See, e.g.*, R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). For a critical review of Epstein's book, see Note, *Richard Epstein on the Foundations of Takings Jurisprudence*, 99 HARV. L. REV. 791 (1986).

157. For analyses of these concepts, see Cunningham & Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 625 (1978) [hereinafter Cunningham & Kremer]; Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 SW. U.L. REV. 545 (1979); Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URB. L. ANN. 63. These concepts have sometimes been construed as originating at least in part from the due process and just compensation clauses. *See, e.g.*, Nemmers v. City of Dubuque, 716 F.2d 1194, 1197 (8th Cir. 1983); Kasparek v. Johnson County Bd. of Health, 288 N.W.2d 511, 522 (Iowa 1980) (McCormick, J., dissenting). More frequently, however, courts refer to these concepts as common law doctrines ameliorating the harshness of applying changed law to existing uses. *See, e.g.*, People v. Miller, 304 N.Y. 105, 107-08, 106 N.E.2d 34, 35 (1952) ("the property interest affected by the particular ordinance is too substantial to justify its deprivation in light of the objectives to be achieved by enforcement of the provision").

as "property?" The "nonconforming use theory" holds that the individual should be given a reasonable amount of time to phase out his apartment building.[158] The phase-out period should take into account such factors as the original investment, present actual or depreciated value, dates of construction, amortization for tax purposes, salvage value, remaining useful life and the harm to the public if the use were to remain after the rezoning occurs.[159]

Sometimes, however, immediate elimination of existing uses may be required. In *Hadacheck v. Sebastian*, the Supreme Court upheld the immediate elimination of an existing brickyard, apparently because the brickyard emitted dust, smoke and fumes.[160] Yet, courts have at times held that the existing use was simply not important enough to be protected as "property." In *People v. Miller*,[161] the defendant had raised pigeons in his home as a hobby since 1945.[162] In 1947, the Town of North Hempstead, New York, enacted an ordinance prohibiting the harboring of pigeons in residential areas without a permit.[163] The case could have been decided on the "noxious use" basis implicit in *Hadacheck*[164] on the ground that pigeons can be nuisances. Instead, the court expressly avoided that ground and held that only a "purely incidental use of property for recreational or amusement purposes only" was involved, not "property" protected by the nonconforming use theory.[165]

Hadacheck could not operate a brickyard on his land, Miller could not raise pigeons. Were the expectations in each case justifiably "taken" in light of their nuisance character or were they deemed not to exist at all? *Miller* could have been decided under a nuisance theory under which property admittedly exists, the court simply chose

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158. This is actually a misnomer because the concept applies to nonconforming structures, as in the hypothetical, as well as to nonconforming uses, as in the situation in which a sixteen-room "single-family" mansion has been subdivided into apartments. Thus, to be accurate the concept should perhaps be referred to as the "nonconforming development theory."

159. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1979) (billboards), *rev'd on other grounds*, 453 U.S. 490 (1981); Harris v. Mayor and City Council, 35 Md. App. 572, 371 A.2d 706 (1977) (injunction directing that structures converted to multi-unit dwellings be returned to prior less intensive use). *See generally* R. ELLICKSON & A. TARLOCK, LAND USE CONTROLS, CASES AND MATERIALS 194-98 (1981).

160. 239 U.S. 394, 408-10 (1915).

161. 304 N.Y. 105, 106 N.E.2d 34 (1952).

162. *Id.* at 106-07, 106 N.E.2d at 34-35.

163. *Id.*

164. 239 U.S. at 411.

165. 304 N.Y. at 109, 106 N.E.2d at 36.

not to do so. *Hadacheck* could have been decided on the ground that the expectation of continuing the brickyard was not "property." Similarly, the termination of the use of an individual's lot for apartments may be viewed either as the "taking" of the person's property justified by the interest of the community in single-family residential development, or, alternatively, as a governmental declaration that his expectation is not "property." Perhaps the two theories are really one: whether property exists and whether governmental action affecting property gives rise to a remedy are essentially the same question.

2. *The Vested Rights Theory*

A second land use doctrine that operates in a similar fashion as the nonconforming use theory is the "vested rights theory."[166] Suppose, for example, that an individual purchases a lot with the intention of constructing an apartment building. Before the zoning is changed to allow only single-family residences, the individual: (1) obtains a building permit; (2) relies in good faith on the permit; (3) spends substantial amounts of money for materials and hiring of workers; and (4) finishes all the construction except for the final coat of paint. Under the vested rights theory, the individual would be allowed to finish the apartment building. That does not mean, however, that the changed zoning would be nullified with respect to the lot. Upon completion, the apartment building would be a nonconforming use, inconsistent with the single-family residence zoning and therefore subject to a reasonable period of amortization.[167]

This example demonstrates the connection between the nonconforming use theory and the vested rights theory. Under the nonconforming use theory, the "expectation" involved is the hope of continuing an *existing* use; under the vested rights theory, the "expectation" involved is the hope of completing development to the point where it will be protected as a nonconforming use. Thus, the nonconforming use theory defines "property" as when expectations of continuing *existing* uses will be protected; the vested rights theory defines "property" as when expectations of completing *incipient* uses will be protected.

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166. *See supra* note 157 and accompanying text.

167. *See* Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977).

3. The Estoppel Theory

To illustrate the third land use doctrine, suppose that an individual purchases a lot, but: (1) obtains only an informal approval to build an apartment building from the local building inspector; (2) relies in good faith upon the inspector's word; (3) hires an architect who draws the requisite plans; and (4) buys the necessary timber and has the lot graded and the cement foundation laid. The zoning is then changed to prohibit apartment buildings. Because the individual did not obtain a formal permit and because his reliance may not have been "substantial," he probably has not met the rather rigorous requirements under a strict vested rights theory.[168] Under the "doctrine of equitable estoppel," however, the lot owner may nevertheless be allowed to finish the apartment building if "justice" so requires.[169]

According to the equitable estoppel theory, the government will be estopped from applying new laws where: (1) the government official involved was aware that the plaintiff would rely on his representations; (2) the official involved intended that his representation would be acted upon, or so acted as to reasonably give rise to that inference; (3) the plaintiff was ignorant of the true state of the law; (4) the plaintiff relied on the representation to his detriment; and (5) estopping the government would not nullify a strong public policy.[170] The estoppel doctrine is thus a close cousin to the vested rights doctrine. The vested rights doctrine is more formal, with relatively strict requirements; the estoppel doctrine is a "do justice" construct, essentially requiring the plaintiff to throw himself at the mercy of the court.[171] Like the nonconforming use and vested rights doctrines, however, the estoppel theory provides for determination of the circumstances under which expectations will be accorded legal protection and thus defines property.[172]

C. The Need for a Coherent Federal Constitutional Property Theory

The nonconforming use, vested rights and estoppel theories aptly illustrate the artificiality of the distinction between the definition of

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168. *See infra* note 173 (discussing strict and non-strict vested rights theories).

169. *See, e.g.*, Town of Largo v. Imperial Homes Corp., 309 So. 2d 571, 572-73 (Fla. 1975).

170. *See, e.g.*, City of Long Beach v. Mansell, 3 Cal. 3d 462, 488-89, 476 P.2d 423, 442-44, 91 Cal. Rptr. 23, 42-44 (1970).

171. *See supra* note 157 and accompanying text.

172. *See generally* Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WISC. L. REV. 340 (describing interaction between formation of property expectations and evolution of legal principles of succession).

property and governmental action affecting it. At the same time, however, they demonstrate the need for a developed theory of federal constitutional property. First, the protection afforded under each of the theories varies from state to state.[173] Second, the only relief available under each is temporary immunity from changed laws, not damages.[174] A property owner dissatisfied with that level of protection can reasonably be expected to look to the federal constitution for possible additional relief. As discussed earlier, the Supreme Court has reserved a definite role for itself in defining "property."[175] Yet, just as there is no cogent standard for determining when governmental action affecting property will require a remedy,[176] there is no established federal constitutional definition of property.[177] The closest the Court has come to articulating a constitutional property standard is Justice Stewart's concurring opinion in *Hughes v. Washington*.[178]

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173. Most states adhere to the nonconforming use theory. *See* State v. Joyner, 286 N.C. 366, 375, 211 S.E.2d 320, 325 (discussing nonconforming use rule as applied across country and adopting majority rule), *appeal dismissed*, 422 U.S. 1002 (1975). The Missouri courts prohibit altogether the immediate elimination of nonconforming uses, however, on the ground that, the Supreme Court's holding in *Hadacheck* notwithstanding, "no one has, as yet, been so brash as to contend that such a pre-existing lawful nonconforming use properly might be terminated *immediately*." People Tags, Inc. v. Jackson County Legislature, 636 F. Supp. 1345, 1357 (W.D. Mo. 1986) (applying Missouri law) (citation omitted) (emphasis in original); *see also* Missouri Rock, Inc. v. Winholtz, 614 S.W.2d 734, 739 (Mo. Ct. App. 1981).

The states vary far more regarding the requirements for triggering "vested rights" protection. The requirements from California, *see supra* text accompanying note 167, are probably the most extensive. At the other extreme, in Washington, a property owner generally acquires a vested right simply by having made an application for a permit before the zoning was changed. *See* West Main Associates v. City of Bellevue, 106 Wash. 2d 47, 720 P.2d 782 (1986). For a comparison of "late vesting" rules such as California's and "early vesting" rules such as Washington's, see Cunningham & Kremer, *supra* note 157.

Similarly, states vary in their interpretation of the estoppel doctrine. *See, e.g.*, City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970); Killearn Properties, Inc. v. City of Tallahassee, 366 So. 2d 172 (Fla. Dist. Ct. App.), *cert. denied*, 378 So. 2d 343 (Fla. 1979); Southern Nevada Memorial Hosp. v. State, 101 Nev. 387, 705 P.2d 139 (1985); Pokoik v. Silsdorf, 40 N.Y.2d 769, 358 N.E.2d 874, 390 N.Y.S.2d 49 (1976); Burdick v. Independent School Dist. No. 52, 702 P.2d 48 (Okla. 1985); Xanthos v. Board of Adjustment, 685 P.2d 1032 (Utah 1984); *In re* McDonald's Corp., 146 Vt. 380, 505 A.2d 1202 (1985).

174. *See supra* notes 156-72 and accompanying text (discussing nonconforming use theory).

175. *See supra* notes 19-151 and accompanying text.

176. *See supra* notes 41-123 and accompanying text.

177. On the contrary, the conventional wisdom espouses the proposition that property is defined by state and extra-constitutional federal law. *See supra* notes 28-40 and accompanying text.

178. 389 U.S. 290, 294 (1967) (Stewart, J., concurring).

In *Hughes*, the plaintiff was the successor in title to a federal grantee of ocean-front lands.[179] Over the years, accretion had added to the original boundaries.[180] The state supreme court held that under state law, the accretions were state lands.[181] The Supreme Court, however, held that federal common law controlled the definition of property rights to federal patent lands, and that under federal law, the upland owner also owned the accretions.[182] Justice Stewart found that the state court decision in the case effectively *overruled* a twenty-year holding that accretions belonged to upland owners.[183] He concluded that the overruling of a twenty-year precedent was "startling."[184] Accordingly, he would have held that federally protected property was involved and that it had been taken without just compensation.[185]

Under Justice Stewart's theory, a person has a right not to be unduly "surprised" by a change in law prohibiting what was formerly allowed with respect to property.[186] Expectations founded upon existing law can be interrupted—in fact, totally frustrated—as long as the interruption or frustration could have been anticipated.[187] This is similar to the Court's discussion of Monsanto's expectations in *Ruckelshaus*: Monsanto should have been aware of the EPA's practice of disclosing testing and research information to applicants other than those who submitted them and also should have been aware of a change in FIFRA expressly allowing the EPA to disclose such information after the expiration of a ten-year period from its sub-

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179. *See id.* at 291.

180. *See id.*

181. *See* Hughes v. Washington, 67 Wash. 2d 799, 816, 410 P.2d 20, 29 (1966), *rev'd*, 389 U.S. 290 (1967).

182. 389 U.S. at 292-94.

183. *See id.* at 297-98 (Stewart, J., concurring).

184. *Id.* at 297 (Stewart, J., concurring).

185. Justice Stewart pointed out that the state court's proclamation that the accretions were public lands was unquestionably a "taking" of property. *Id.* at 297-98 (Stewart, J., concurring).

Unlike the usual situation involving governmental action by the legislative or executive branch, Justice Stewart conceived the judicial action in *Hughes* as constituting a taking. A recent illustrative case is *Robinson v. Ariyoshi*, in which the court was asked to review a federal district court decision preventing the enforcement of a Hawaii state supreme court decision which in turn had overruled state common law water rights. 753 F.2d 1468 (9th Cir. 1985), *aff'g* 441 F. Supp. 559 (D. Haw. 1977), *vacated*, 477 U.S. 902 (1986). The case is discussed further in Martinez, *Taking Time Seriously: The Federal Constitutional Right to be Free From "Startling" State Court Overrulings*, 11 HARV. J.L. & PUB. POL'Y 297 (1988).

186. *See Hughes*, 389 U.S. at 296 (Stewart, J., concurring).

187. *See id.* at 296-98 (Stewart, J., concurring).

mittal.[188] Accordingly, Monsanto should not have been unduly surprised that the EPA might disclose such information. In contrast, for the period 1972 through 1978, when FIFRA expressly provided that such information would not be disclosed, Monsanto would have been unduly surprised by the prospect of disclosure.[189]

There is, however, substantial room for interpretation regarding whether circumstances involve a "startling" change or not. In *Hadacheck*; should the plaintiff have been surprised that the City of Los Angeles prohibited use of his brickyard?[190] Surely the mere prospect of land use regulation does not prepare one to have a use treated as lawful one day and unlawful the next. Even if Hadacheck should have been forewarned because of the industrial nature of his use, what about Miller and his pigeons?[191] If public policy changes, is the individual charged with predicting its direction? On the other hand, in *Loretto*, should the plaintiff have been surprised that New York City required that she allow the cable company to install cables on her building?[192] The Court held in her favor. Yet, has tenants' access to cable television now become a necessity similar to telephone, electricity and sewer access, to the point that a landlord should anticipate being required to allow its provision to his tenants?

Justice Stewart's standard seems too uncertain to be workable. More fundamentally, perhaps it boils down to the proposition that property is simply that which cannot be taken, at all or without compensation. If so, then a workable theory for resolving particular cases becomes imperative. Yet, no such theory has been developed.[193]

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188. 467 U.S. at 993-97, 1006-10, 1013; *see also supra* notes 142-49 and accompanying text.

189. *See supra* notes 146-47 and accompanying text.

190. 239 U.S. 394, 404-05 (1915); *see also supra* notes 57-64 and accompanying text.

191. *See* People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1952); *see also supra* notes 161-65.

192. 458 U.S. 419, 438 (1982); *see also supra* notes 109-11 and accompanying text.

193. For discussions regarding the definition of property for constitutional purposes, see Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 S. CAL. L. REV. 355 (1978) (United States Supreme Court must establish minimum federal property) [hereinafter Glennon]; Michelman, *Property As a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1103 (1981) ("the Constitution does and must protect, as property, some claims that are not treated as entitlements by standing law").

For a discussion of the minimum federal constitutional property rights from the perspective of federalism concerns, see Glennon, *supra*; Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405 (1977).

IV. Reconstructing the Takings Problem by Redefining Property

This Article proposes that defining constitutional property and determining when governmental action so affects it as to require a remedy are not two distinct questions, but rather one: under what circumstances is government justified in expanding, contracting or even completely eliminating private expectations?[194]

One way to attempt to define those circumstances is through presupposing that property and governmental action affecting it are two distinct inquiries, as both the just compensation and due process theories under current takings doctrine seem to assume.[195] Under the just compensation approach, the strong natural rights notion—that property has an existence independent of governmental action—is the basis for this separation.[196] Under natural rights theory, individual rights *pre-exist* government; it is thus an objective of government to recognize these rights.[197] Accordingly, the just compensation theory views rights as in some sense independent of government.[198] The natural rights approach in the just compensation theory, though, may be partly responsible for the unworkable character of takings doctrine generally. For example, nothing in the nature of property tells society whether the extent of the financial impact on the particular person affected by the governmental action involved is important, or whether it is significant that government's obligation to provide compensation may substantially deplete the public treasury and, consequently, preclude other government programs that might have been undertaken, thereby jeopardizing government's ability to protect the community.

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194. More specifically, this issue concerns the circumstances under which private expectations can be affected by governmental action regardless of whether compensation is provided. For similar observations about the interconnections among the various components of the takings doctrine problem, see Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1598 (1982); Rose, *supra* note 99, at 598-99; Ross, *Modeling and Formalism in Takings Jurisprudence*, 61 NOTRE DAME L. REV. 372, 424-25 (1986).

195. *See supra* notes 41-127 and accompanying text.

196. This may be the impetus for a narrow definition of the relevant property in just compensation clause jurisprudence. *See supra* notes 94-103 and accompanying text (discussing narrow definition of relevant property in *Pennsylvania Coal*); *see also* Rose, *supra* note 99, at 568 (describing broad definition of relevant property as "deep pocket" rule).

197. *See supra* note 155 and accompanying text.

198. *See, e.g.*, Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 408-09 (1979).

The due process approach, the other strong current in existing takings doctrine, also presupposes that property and governmental action affecting it are two distinct inquiries; in contrast to the just compensation theory, however, due process emphasizes the preservation of collective well-being.[199] Nothing in the nature of government tells society, however, how collective well-being is limited by the expectations of the individuals affected. Yet, surely there is a legitimate claim that in certain circumstances, social well-being should not be achieved at the sacrifice of the individual. The due process tradition, however, does not address the proper scope of individual concerns.

Perhaps the first step toward reconstructing the takings problem is to rethink society's views about property. It will then be possible to identify the factors involved in reviewing governmental action with respect to private expectations and thereafter begin the formulation of an analytical model for resolving particular cases.

A. Property as Sovereignty

The essential similarity between property and governmental action is noted by Professor Morris Cohen in an article entitled "Property and Sovereignty."[200] Professor Cohen explains that property evolved from two distinct traditions, one a "dualist conception" and the other a "unitary conception."[201] The dualist conception makes a sharp distinction between the private and public spheres of law: property lies in the private sphere, sovereignty in the public sphere.[202] The unitary conception, however, combines property and sovereignty.

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199. *See supra* note 73 and accompanying text.

200. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927) [hereinafter Cohen]. In a brief but provocative reference, Professor Cohen intimates that his ideas have implications for takings theory:

> An adequate theory of private property, however, should enable us to draw the line between justifiable and unjustifiable cases of confiscation. Such a theory I cannot undertake to elaborate on this occasion, though the doctrine of security of possession and avoidance of unnecessary shock seem to me suggestive.

Id. at 26.

Professor Michelman describes his own seminal article on the takings problem as an elaboration of Professor Cohen's statements. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1202 n.78 (1967).

201. *See* Cohen, *supra* note 200, at 8-9.

202. *See id.* at 8. The dualist conception may have sprung from Roman law, under which "dominium" was the rule over things by the individual and "imperium" was the rule over individuals by the prince. *See id.* at 8-9.

According to that conception, society should view ownership of property as society views governmental power.[203]

Professor Cohen rejects the dualist conception because it purports to define property rights solely as power over things.[204] He contends that property rights embody power *over other people.*[205] The most significant aspect of that power, he argues, is "the right to exclude."[206] Professor Cohen claims that the right to exclude has two ramifications. First, it confers on the property holder the power to make others do what he wants in order to be allowed use of the property involved.[207] Second, it confers on the property holder the power to force others to contribute more property to him in the form of rents or user fees.[208] Professor Cohen concludes that the

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203. Through the 18th Century, Hessian princes sold their subjects as soldiers to rulers of other states. *See id.* at 9. Early feudal relations were unitary in that they combined sovereignty and property in the landlord:

> The essence of feudal law . . . [was] the inseparable connection between land tenure and personal homage involving . . . services on the part of the tenant and . . . sovereignty by the landlord. . . . Ownership of the land and local political sovereignty were inseparable.

Id.

Early feudal constraints on alienation restricted the ownership of land and thus reserved the "sovereign" power that land conferred to a privileged few. *See id.* at 9-10. As the law evolved away from such feudal constraints on alienation of land, and land became more marketable, however, the sovereign power of land became available to more people, at least in theory. *See id.* at 10. Except through gifts, inheritances or adverse possession, however, people could not acquire land without money. Thus, a free market in land simply transformed a land economy into a money economy. Money became the basis for sovereign power. Money could be used to acquire any kind of property, though, not just land. Accordingly, sovereign power, formerly restricted to ownership of land, became common to *all* forms of property. *See id.*

204. *See id.* at 12.

205. *See id.*

206. *Id.* at 12-13. Some commentators assert that property has essential characteristics other than the right to exclude. *See, e.g.*, L. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 18-19 (1977) (listing eleven other property elements).

The concept of property has evolved dramatically throughout the last two centuries. *See, e.g.*, Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938) [hereinafter Philbrick]; Reich, *The New Property*, 73 YALE L.J. 733 (1964); Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325 (1980) [hereinafter Vandevelde]. Wesley Newcomb Hohfeld articulated the most comprehensive and influential reconceptualization. *See* Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

207. Cohen, *supra* note 200, at 12.

208. *See id.* Professor Cohen explains the tenet in this way:

> If then somebody else wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent. To the

former is fundamentally indistinguishable from governmental power to control people through civil or criminal laws and that the latter is similarly indistinguishable from governmental power to tax.[209]

Property ownership thus comprises the power to command the services of people who are not economically independent and the power to tax the future social product—both of which also constitute the essence of sovereignty.[210] Professor Cohen's conclusion, therefore, suggests that *dominium* over things necessarily implies *imperium* over people.

B. Limiting Property-Qua-Sovereignty

Professor Cohen's insight is that property is indistinguishable from governmental power. He argues, therefore, that "it is necessary to apply to . . . property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government."[211]

Professor Cohen seems to suggest that property is like governmental power and since society limits governmental power, society should limit property-qua-sovereignty as well.[212] Perhaps society already does. The paradigmatic case is eminent domain. There is no question that property can be taken for public use as long as compensation is paid and certain procedures are followed.[213] Thus, the exercise of eminent domain limits private expectations. The exercise of the police power through zoning is a similar constraint. The due process theory reveals that substantial reductions in expectations can be imposed through zoning.[214] Even under the just compensation theory, private expectations can apparently be severely restricted through zoning before a public obligation to provide compensation arises.[215] Judicial action, through the formulation and

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> extent that these things are necessary to the life of my neighbor, the law thus confers on me a power, limited but real, to make him do what I want.

Id.

209. *See id.* at 13. For a similar observation, see Vandevelde, *supra* note 206, at 327-28.

210. Cohen, *supra* note 200, at 13; *see also* Philbrick, *supra* note 206, at 696-97 (referring to two major characteristics of property as property for use and property for power).

211. Cohen, *supra* note 200, at 14.

212. *See id.*

213. *See supra* notes 5-7 and accompanying text.

214. *See supra* notes 43-73 and accompanying text.

215. *See supra* notes 74-127 and accompanying text.

application of common-law doctrines, also limits private expectations. The judicially-evolved nonconforming use, vested rights and estoppel cases similarly reveal that private expectations may be severely curtailed, although it depends on the degree and kind of private reliance involved.[216]

The quandary presented by the takings problem is not whether private expectations may be limited, but rather, under what circumstances. This Article demonstrates that property and governmental action affecting it are, in essence, the *same* question. Property is not only similar to governmental power, as Professor Cohen suggests, but is a function of it. It is therefore perfectly reasonable to restrict property as society restricts governmental power, *because that is ultimately what property is.*[217] It remains to specify what factors should be considered in restricting property-qua-sovereignty and to develop an analytical approach for particular applications.

Recent analyses of the notion of rights of property may help identify these factors. Professor Margaret Radin, for example, urges that property is most satisfactorily understood not as an object apart from those who own it, but as intrinsic to the personality of those who use it.[218] She argues that the most significant function of property is the support of "personhood":[219]

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216. *See supra* notes 153-72 and accompanying text.

217. The debate about subjecting private conduct to the same restraints as governmental action has revolved around the state action doctrine. *See* Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1483-92 (1982) (arguing for elimination of requirement altogether) [hereinafter Stone]. For a demonstration of the decline in the public-versus-private conduct distinction for purposes of determining whether state action is involved, see Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982). The accepted wisdom is that purely private action remains free from constitutional constraint:

> Where an ordinary mortal is concerned, we can discern a value in preserving a sphere, free from state influence, in which he or she may be arbitrary, capricious, and prejudicial.

Stone, *supra*, at 1489.

Professor Brest, however, demonstrates the fundamental connection between the state action doctrine and the natural rights theory of property: state action doctrine prevents examination of assertions of private power in the name of rights to property existing independently of government. *See* Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1299-1300 (1982). This Article has shown that the natural rights notion is reflected in the takings doctrine and similarly prevents examination of private power.

218. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

219. *Id.* at 959-61; *see also* Bender, *The Takings Clause: Principles or Politics?*, 34 BUFFALO L. REV. 735, 825-28 (1985) (property interests that implicate "personhood" concerns such as free speech or privacy should be given greater judicial protection).

> [The notion that people] invest part of their identity in material objects, such as diaries, wedding bands, family homes, and religious or cultural shrines [an identification which] characteristically occurs through the objects' particular relation to people's histories or traditions. . . . The personhood function of property is to protect people's control of the unique objects and the specific spaces that are intertwined with their present and developing individual personality or group identity.[220]

On the other hand, Professor C. Edwin Baker explores the treatment of property from a broader perspective.[221] He examines whether government regulation of property should differ from government regulation of activities such as speech, procreation and association that currently receive greater constitutional protection.[222] Professor Baker suggests that the question is not whether society should treat property interests as society treats liberty interests, but rather whether society should refine its treatment of property interests.[223] He argues that under the prevalent, monolithic notion of property, society commonly subsumes many different interests which should be treated differently for constitutional purposes.[224] Thus, Professor Baker concludes that "the constitutional status of a governmental rule or practice that abolishes, creates, changes, or regulates some specific property right . . . should depend on the functions or values" which that interest serves for the individual.[225]

For Professor Baker, the personhood function described by Professor Radin is only a specific instance of a general "use" function of property. Professor Baker describes the general use-function as follows: "People rely on, consume, or transform resources in many of their self-expressive, developmental, productive, and survival activities. These uses of resources are integral to a person's liberty, viewed either as self-realization or as self-determination."[226]

A second specific instance of the general use-function according to Professor Baker is the "welfare function," intended to secure an individual's claim to those resources that are essential for a "meaningful life."[227] Particularly important are those necessities es-

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220. Baker, *Property and its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 747 (1986).
221. *See id.* at 741.
222. *See id.*
223. *See id.* at 743.
224. *See id.* at 744.
225. *Id.*
226. *Id.*
227. *Id.* at 745.

sential for "survival" and for "meaningful existence as understood in a person's own community."[228] Professor Baker contrasts the welfare and personhood function in the way each contributes to a person's well-being. According to him, the welfare function requires "protection of claims to generic types of resources," whereas the personhood function requires "protection of specific, unique objects or spaces."[229]

In addition to the use-related functions, Professor Baker describes the protection, allocative and sovereignty functions of property. The "protection function" protects individuals from "unjust exploitation by other individuals or by governments."[230] Thus, it would be unacceptable "for either the state or a private entity invidiously or otherwise unfairly to pick out a particular person or group to bear some unwanted burden."[231] The "allocative function" facilitates certain means by which individuals "secure the resources that they need for their productive or consumptive activities."[232] This is not so much a function for protection of individual interests as it is a function for the realization of collective concern about the allocation of resources toward whatever ends are collectively deemed desirable. Thus, "[i]f there is an individual . . . right here, it could only be the right to decide autonomously how to participate politically in the necessarily collective decision."[233] Closely connected to the allocative function is the "sovereignty function," described by Professor Baker as the power to influence others through controlling the terms under which property will be exchanged.[234]

An example may help illustrate these various functions. Suppose that an individual is a large-scale land developer and a small part of one of his various tracts of land is downzoned from apartment to single-family residence use. Assume further that the person had hoped to build apartments. General use-function may be involved, in the self-determination sense, because the individual can no longer choose to build apartments. The sovereignty function may also be involved, since the land may not command as high a market price zoned for single-family residences as it would when zoned for apartments and the individual cannot influence others to pay him the

228. *Id.*
229. *Id.* at 747.
230. *Id.*
231. *Id.* at 748.
232. *Id.*
233. *Id.* at 750.
234. *Id.* at 752.

higher market price. In contrast, the use-welfare function is probably not involved, since the individual probably has the necessities of life irrespective of the rezoning. Similarly, it is doubtful that the use-personhood function is involved, since the person probably did not "define himself" in terms of being able to build apartments. Moreover, the protection function seems not to be involved, since as a large-scale developer, the individual can probably still control sufficient resources to prevent exploitation by others. If the individual is not a very successful developer, however, and is down to his last penny, perhaps then the protection function might be involved. Finally, the allocative function may be involved if the individual has no opportunity to participate politically in the collective decision to rezone. This might occur if the person was not provided with adequate notice of the local government's consideration of the ordinance rezoning the property and was thereby deprived of the opportunity to be heard regarding its merits.

C. Prerequisites to Reconstructing the Takings Doctrine Along Functional Lines

A number of questions have to be addressed before a functional orientation with respect to property can serve as the foundation for reconstructing the takings doctrine. For example, which property functions should be given legal recognition?[235] Are there functions served by property that are not included in Professor Baker's list or that should not be there? Moreover, should the functions that *are* legally recognized be arranged into a hierarchy, with some given greater weight than others? To take the example set out above, suppose that the individual is a land developer and a small portion of one of his land tracts is downzoned from apartment to single-family residential use. Functions usually identified with economic concerns are involved—the general use function of being able to choose to build apartments, and the sovereignty function of being able to command the higher apartment-use market price. On the other hand, the use-personhood function, usually identified with an emotional attachment, is arguably not involved. Contrast this situation with that of a gray-haired, eighty-five year-old widow in poor health who owns an old house that stands in the path of a proposed freeway. Suppose further that the house was built by her husband

235. Professor Baker acknowledges that his decision to specify the functions he selected involves value choices and particular perspectives. *See id.* at 753 n.25.

and that all her children were born and raised in it. She has a strong emotional tie to the house, over and above its economic value to her or to anyone else. In functional terms, her use-personhood interest is involved, but little else. Does that function nevertheless have overriding importance? Would it override even a governmental claim of eminent domain?

V. Conclusion

The social implications of a functional approach should govern not only the definition and hierarchical arrangement of property functions, but also the allocation of institutional responsibility between courts and legislatures in determining which functions are given legal recognition and in establishing the hierarchical order of those functions. The social implications should include whether everyone would be entitled to a minimum amount of resources, and if so, what effect that would have on the ways in which society provides for the poor.[236] Moreover, how such factors would affect private enterprise incentives, particularly whether individuals should be prohibited from acquiring more than a maximum amount of resources, would also have to be considered. In light of these and other similarly profound social implications, perhaps identification and hierarchical ordering of the functions of property should be an exclusively legislative matter. Legislation could address the problems raised by current approaches to takings situations, identify the functions that should be given legal recognition and arrange them in a hierarchical order. By identifying the relevant questions, this Article may serve as a first step toward reconstruction of existing takings doctrine along functional lines.

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236. Professor Baker contends that to deny a person the resources the community considers necessary to satisfy the use-welfare function "should be unacceptable under our constitutional order." *Id.* at 746.